Filed 6/5/09 P. v. Northcutt CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PHILIP NORTHCUTT, Defendant and Appellant.	B203883 (consolidated with B208126) (Los Angeles County Superior Ct. No. NA069645)

APPEAL from a judgment of the Superior Court of Los Angeles County. James Pierce, Judge. Reversed and remanded.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Philip Northcutt appeals from the judgment entered following a jury trial in which he was convicted of cultivating marijuana. Appellant contends the trial court erred by including the quantitative limits of Health & Safety Code section 11362.77 in its instruction on appellant's medical marijuana defense and by failing to instruct that collective cultivation is permissible. We agree.

FACTS

Long Beach police officers who stopped appellant's car noticed a strong odor of marijuana coming from the car. Appellant told them that he was carrying marijuana that he used for medical purposes. Appellant had two jars containing a total of 20.94 grams (0.7386 ounces) of marijuana, a loaded handgun, and $1,320 in cash with him in the car. Appellant gave the officers the address of his grandmother's house, where he said he lived and grew marijuana. In a room next to a detached garage on the property, the officers found a total of 20.08 grams (0.7083 ounces) of marijuana in jars and plastic bags, five tablets of ecstasy, a scale, gloves, shipping boxes, and a utility bill in appellant's name for another address. They also found an unloaded shotgun inside a case in the adjacent garage.

The police obtained a warrant and searched the warehouse at the address listed on the utility bill. Detective Gregory Roberts testified that he and other officers found 339 female marijuana plants inside the warehouse. Ninety-five of the plants were mature. The mature plants were no more than a month away from being ready to harvest. The officers also found 18 jars containing a total of 1.2 pounds of processed marijuana, some plastic bags of harvested marijuana that required further processing, some jars containing liquid and some marijuana leaves, and a loaded shotgun. The parties stipulated that the

total quantity of plant matter at the warehouse was a little less than 17 pounds. There was a surveillance camera outside the front entrance to the warehouse.

According to Roberts, who also testified as the prosecution's expert, the plants in the warehouse would likely yield three to five ounces of usable marijuana per plant. Roberts also testified that a typical marijuana user consumes about a gram—or one-thirtieth of an ounce—of marijuana per day, without regard to whether the use is for medical purposes. Roberts estimated the street price of appellant's marijuana at $3,000 per pound. Roberts testified that California law allows possession of up to eight ounces of dried marijuana and six mature or 12 immature plants for personal medical use, and appellant far exceeded the statutory limit. Based upon the large number of plants at appellant's warehouse and the presence of the security camera, gun, and scale, Roberts opined that appellant was growing marijuana for profit, not medical use. Roberts acknowledged that marijuana patients were allowed to collectively cultivate marijuana, but he opined the quantity of marijuana was still more than the needs of two or three people.

Appellant testified that he was an Iraqi war veteran who suffered from post-traumatic stress disorder and chronic sciatica. Military physicians had prescribed pain killers for him, but they made him feel "drunk" all day and did not permit him to live a normal life. He consulted Dr. William S. Eidelman, who gave appellant a written recommendation for the medical use of marijuana. Dr. Eidelman also gave Jennifer Morgan, appellant's girlfriend, a written recommendation for the medical use of marijuana. Appellant had seen his friend Christopher Schultheis's written recommendation from a different physician for the medical use of marijuana. He also knew his friend Barry Armbrister had a verbal recommendation from a physician to use medical marijuana to alleviate pain. Because appellant was dissatisfied with the cost, lack of quality control, and chemicals commonly used in growing the marijuana available at cannabis clubs, appellant learned to grow his own organic marijuana.

With the exception of about 27 plants in the warehouse that Schultheis exclusively owned and tended, appellant grew the marijuana plants in the warehouse to supply the medical needs of 12 or more individuals, including himself. Each person in the cooperative was a patient authorized to use medical marijuana. Appellant "paid for just about everything up front" and asked the other people he supplied to make donations, but they were not wealthy people, "[s]o they contribute what they can with maybe some money and some labor." Some helped with the growing, others helped clean. Everyone contributed to the cooperative in their own way. Appellant did not charge any members for the marijuana, but simply asked them to contribute as much as they could. Appellant was unwilling to disclose the identity of anyone other than his girlfriend, Armbrister, and Schultheis because the other people feared they would be criminally charged if their identities became known. There were "five really active members who would come all the time, every day or every other day" to "work on the plants" or do other chores. There were others who "didn't come by" often.

The marijuana in the car when appellant was stopped was his, as was the marijuana in the guest house at his grandmother's property. The ecstasy was not appellant's. Appellant used about 3.5 grams—about one-eighth ounce—of dried marijuana per day. His girlfriend and Schultheis each used about the same amount. The other two primary members of the growing cooperative used about the same amount. Appellant found that was a "typical" amount for co-op members to use.

Appellant testified the cash he had was from a paycheck he had cashed. He was going to pay his rent with it. The shotgun at the warehouse was not appellant's, and he was not aware of its presence. Appellant carried the handgun for his personal protection while carrying his "medicine."

Dr. Eidelman testified that he authorized medical marijuana use for appellant and Jennifer Morgan.[1]

Christopher Conrad testified as an expert witness for the defense. He examined and weighed all of the marijuana seized by the police in this case, reviewed the police reports, and examined the police photographs of the plants in the warehouse. He determined that all of the seized marijuana that was either ready to consume or nearly ready to be consumed was equivalent to 2.54 pounds of "net bud equivalent." In addition, the police seized unusable "marijuana by-product" and immature plants that Conrad opined would ultimately have yielded 1.7 pounds of usable marijuana. Conrad testified that the police included "a lot of dead plants" that had been "cut down and broken off and discarded" in their total plant count. He opined that medical marijuana users commonly used about an ounce per week or three pounds per year. He noted that a federal governmental program provided patients with an average of 6.65 pounds each per year. The processed marijuana seized by the police in this case would therefore provide about two-thirds of one patient's supply for one year. The seized immature plants in cultivation would provide about one-half of one patient's supply for one year. If there were four or five patients consuming it, the seized material would provide "well under" a year's supply for each. Accordingly, Conrad opined that all of the marijuana in this case fell under the protection of the medical marijuana law. On cross-examination, Conrad testified that he was aware of five people who were "supposed to get medical marijuana from this facility."

The jury convicted appellant of cultivating marijuana in violation of Health & Safety Code section 11358[2] and found that appellant possessed a firearm in the

---

[1] Eidelman also testified that Defense Exhibit A shown was a letter of recommendation containing "the exemption from the SB 420 [quantity] guidelines" that he issued to appellant.

[2] Unless otherwise noted, all further unspecified statutory references pertain to the Health & Safety Code.

commission of the offense (Pen. Code, § 12022, subd. (a)(1)). The jury acquitted him of possessing marijuana for sale and possessing ecstasy, and the trial court had previously dismissed, pursuant to Penal Code section 1118.1, a charge of possessing ecstasy with a firearm (§ 11370.1, subd. (a)).

The court suspended imposition of sentence and placed appellant on formal probation on conditions including service of one year in jail and a ban on possessing and using all "narcotics, dangerous or restricted drugs." Appellant had custody credits in excess of one year.

DISCUSSION

The Compassionate Use Act (CUA) was added by the passage of Proposition 215 in 1996. The CUA provides that sections 11357 and 11358, which criminalize the possession and cultivation of marijuana, "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).)

In 2003, the Legislature passed the Medical Marijuana Program (MMP) to "[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest. . . , [p]romote uniform and consistent application of the act among the counties. . . , [e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects[,] . . . [and] address additional issues that were not included within the act, and that must be resolved in order to promote the fair and orderly implementation of the act." (Stats.2003, ch. 875, § 1 (Sen. Bill No. 420).) The MMP establishes a system under which individuals who have a physician's recommendation or approval for the medical use of marijuana and their primary caregivers may obtain county-issued identification cards to show to the police.

(§§ 11362.71-11362.76.) The MMP also expands the group of offenses for which the CUA provides a defense. (§ 11362.765.)

Although the CUA does not limit the amount of marijuana a patient could possess or use, the MMP provides that a qualified patient or primary caregiver may not possess more than eight ounces of dried marijuana per patient, plus no more than six mature or 12 immature marijuana plants, unless he or she has a doctor's recommendation that this quantity does not meet the patient's medical needs. (§ 11362.77, subds.(a) and (b).) "Qualified patient" is defined by the MMP as "a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to" the MMP. (§ 11362.7, subd. (f).)

The MMP also provides for collective cultivation: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (§ 11362.775.)

The trial court instructed the jury at appellant's trial on a medical marijuana defense as follows:

> "The cultivation or possession for sale of marijuana is not unlawful when the acts of a defendant, a primary caregiver, or qualified patient are authorized by law for compassionate use. The cultivation or possession for sale of marijuana is lawful (1) where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; (2) the physician has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; and (3) the marijuana cultivated or possessed for sale was for the personal medical use of the patient,

primary caregiver, or qualified patient, and (4) the quantity of marijuana cultivated or possessed for sale, and the form in which it was possessed were reasonably related to the patient's, primary caregiver's, or qualified patient's then current medical needs, not exceeding (limits) [of] eight ounces of dried marijuana per qualified patient[,] six mature or twelve immature marijuana plants per qualified patient unless the qualified patient or primary caregiver has a doctor's recommendation or approval that this quantity does not meet the qualified patient's medical needs, in which case the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

"Only the dried mature processed flowers of the female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

"The term 'qualified patient' means a person who is entitled to the protections of the compassionate use law.

"A 'primary caregiver' is an individual designated by the person exempted who has consistently assumed responsibility for the housing, health, or safety of that person.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to cultivate or possess for sale marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of these charges."

Appellant asserts two errors with respect to the court's instructions on his medical marijuana defense.

1. Failure to instruct sua sponte on collective cultivation defense

Appellant first contends the trial court was required to instruct, sua sponte, on collective cultivation, as authorized by section 11362.775.

The trial court has a duty to instruct sua sponte regarding a defense if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.) "Substantial evidence" is evidence sufficient for a reasonable jury to find in favor of the defendant. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' [Citations.]" (*Ibid.*)

Substantial evidence supported appellant's collective cultivation defense. Appellant testified that each of the dozen or so participants in the cooperative he set up was a patient authorized to use medical marijuana. He provided specific details regarding his own physician's recommendation, his girlfriend's, Schultheis's, and—to a lesser extent—Armbrister's -- but his testimony nonetheless addressed, in general form, every participant's possession of a comparable physician's recommendation. Dr. Eidelman's testimony corroborated appellant's testimony with respect to the recommendations given to appellant and his girlfriend. Appellant also testified about the collective and cooperative efforts of the participants to grow the marijuana: about five of the dozen participants were "really active members who would come all the time, every day or every other day" to "work on the plants" or contribute other labor; some participants (most notably appellant) contributed money; and everyone contributed something, based on his or her ability. Appellant did not charge anyone for the marijuana they received. According to Conrad, who was aware there were four or five people who were "supposed to get medical marijuana" grown in the warehouse, the total amount of marijuana seized by the police, including that seized from appellant's car and the guest house at appellant's grandmother's property, was "well under" a year's supply for each of the four or five. Given appellant's testimony that the supply would actually be shared by about a dozen

people, the jury could easily find that the quantity of marijuana cultivated was reasonably related to the participants' collective current medical needs.

Respondent attempts to condition application of section 11362.775 upon numerous requirements not set forth in the statute. First, respondent attempts to import inapplicable meanings and requirements from the Food and Agriculture and Corporations Codes by replacing the adverbs "collectively" and "cooperatively" used in the statute to modify the verb "to cultivate" with the nouns "collective" and "cooperative," respectively. Respondent similarly attempts to replace the verb "associate" in the statute with the noun "association," and thereby limit the collective cultivation defense to groups that have "formalized" their existence in a manner similar to the associations mentioned in the Civil, Corporations, and Food and Agriculture Codes. None of respondent's arguments find support in either the language of the statute or the legislative declarations of purpose accompanying Senate Bill 420. Indeed, imposing such cumbersome requirements would frustrate the Legislature's declared goal of "enhanc[ing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats.2003, ch. 875, § 1 (Sen. Bill No. 420).)

Respondent next argues that in order to support a collective cultivation defense, a defendant must make the same showing as the defendant in *People v. Urziceanu* (2005) 132 Cal.App.4th 747 (*Urziceanu*). The cooperative in issue in *Urziceanu* was a much better organized business than appellant's cooperative, and the defendant in *Urziceanu* made a far more detailed showing at his trial than did appellant. (*Id.* at pp. 760-765.) No court, however, including *Urziceanu*, has required such a detailed showing to support a collective cultivation defense. To warrant instruction on collective cultivation, appellant merely needed substantial evidence showing that his operation fell within the scope of section 11362.775, i.e., that it entailed patients who had written or oral recommendations or approvals from a physician for the use of marijuana for medical purposes (and/or primary caregivers of patients with such recommendations or approvals) associating to collectively or cooperatively cultivate marijuana for their own medical purposes and/or

those of the patients for whom they care. While appellant might have been able to make a more detailed showing, the record includes evidence that, if believed by the jury, was sufficient to raise a reasonable doubt. That was all appellant was required to do to warrant instruction on collective cultivation.

The instruction given did not address the collective cultivation defense. Indeed, the instruction given told the jury appellant's cultivation and possession were lawful only if, inter alia, "the marijuana cultivated or possessed for sale was for the personal medical use of the patient, primary caregiver, or qualified patient" and "the quantity of marijuana cultivated or possessed for sale, and the form in which it was possessed were reasonably related to the patient's, primary caregiver's, or qualified patient's then current medical needs." This phrasing strongly suggested that a defendant could lawfully grow or possess only his or her own marijuana and only so much of it as was reasonably related to his own current medical needs, unless he or she met the qualifications of a primary care giver for others. The instruction did not inform the jury that patients and/or their caregivers can collectively or cooperatively cultivate marijuana for their medical needs and those of the patients for whom they are primary caregivers.

Given appellant's testimony that not all of the marijuana in the warehouse was for his own personal medical needs, and the absence of any evidence showing that appellant was a primary caregiver for any of the other persons who received or would receive the marijuana, the jury would naturally find that appellant did not fall within the scope of the medical marijuana defense, as described by the court. Accordingly, the trial court's failure to instruct upon collective cultivation deprived appellant of a defense supported by substantial evidence, and upon which he relied.

2. Instruction on quantities set forth in section 11362.77

Appellant also contends the trial court's inclusion of the quantity limits set forth in section 11362.77 was error because those limits constitute an unconstitutional amendment of the initiative measure. Respondent concedes that section 11362.77 is an unconstitutional amendment of the initiative to the extent it applies quantitative limits to

"an in-court medical use defense."[3] Respondent therefore concedes the court erred by including the section 11362.77 limits in its instruction, but argues the error was harmless. We address the prejudicial effect of both instructional errors in the next section.

3. Prejudice from instructional errors

The first step in determining the prejudicial effect of the court's instructional errors is deciding whether *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836, provides the appropriate standard. Because the *Chapman* standard applies only to federal constitutional errors, the question is whether the failure to instruct constitutes federal constitutional error, as appellant contends. We conclude it does.

Fundamental fairness, as guaranteed by the Sixth Amendment and the Due Process Clause of the federal constitution, requires that criminal defendants are afforded a meaningful opportunity to present a complete defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485.) The right to present a defense clearly includes the introduction of admissible evidence. In many cases, however, absent instruction on the elements of a defense and/or its effect, the jury will not understand how to apply the defense theory or may misunderstand the elements constituting the defense. For example, in the present case, absent instruction on collective cultivation, the jury would not have known that the mere presence of so many plants in the warehouse did not necessarily deprive appellant of a medical marijuana defense. This is especially true in conjunction with the court's improper inclusion of the section 11362.77 quantity limits in its medical marijuana defense instruction. The jury may have believed appellant's testimony that the plants

---

[3] This is, apparently, based upon the position the Attorney General's office has taken in *People v. Kelly* (2008) 77 Cal.Rptr.3d 390, review granted August 13, 2008, S164830, which is one of two cases challenging the constitutionality of the limits set forth in section 11362.77 that are currently pending on review in the California Supreme Court. (See also *People v. Phomphakdy* (2008) 165 Cal.App.4th 857, review granted Oct. 28, 2008, S166565.)

were collectively grown for a group of medical marijuana patients, but have considered that fact immaterial in light of the quantity limits included in the court's instruction and the absence of any mention in the instruction of collective cultivation or how collective cultivation affected the quantity limits. Thus, the constitutional right to present a defense also requires instructions that permit the jury to apply the defense, e.g., by informing the jury of the elements and effect of the defense where the elements and effect are not obvious.[4] Accordingly, we hold that a failure to instruct or misinstruction undermining an appellant's right to submit to the jury a defense for which he has an evidentiary foundation constitutes federal constitutional error subject to *Chapman* harmless error analysis, i.e., respondent has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Given the substantial evidence supporting a collective cultivation instruction addressed in section 1 of this opinion, the improper inclusion of the quantity limits of section 11362.77 in the medical marijuana defense instruction the trial court actually gave, the emphasis the prosecution placed upon appellant's possession of more harvested marijuana and growing plants than permitted by section 11362.77,[5] and the jury's clear rejection of the prosecution theory that appellant possessed the marijuana for sale, we cannot conclude beyond a reasonable doubt that the court's two instructional errors did not contribute to the verdict. If the jury believed the testimony of appellant and his expert and the jury had been properly instructed, it could reasonably have found that appellant was growing marijuana cooperatively and collectively with at least four other medical marijuana patients to supply the medical marijuana needs of up to a dozen people

---

4 With respect to many common defenses, the "elements" and effect are obvious and require no additional instruction. One may confidently predict, for example, that every juror will understand the nature and significance of an alibi defense.

5 In addition to Roberts's testimony, the prosecutor repeatedly argued that appellant had a "huge quantity of marijuana," "a lot of plants," and exceeded the limits set forth in the medical marijuana law.

authorized to use marijuana for their medical needs. Conrad's opinion that the quantity possessed was reasonable was supported by his testimony that appellant had a total of 4.24 pounds (67.84 ounces) of usable and potentially usable marijuana. At the "common" dosage of one-eighth ounce per day, this would provide about a 45 day supply for 12 people, a 108 day supply for 5 people, a 136 day supply for 4 people, or a 180 day supply for 3 people. Nothing about the quantities, therefore, would necessarily lead the jury to conclude the marijuana was not possessed and being grown to supply "the personal medical purposes of the patient[s]" that appellant testified were involved in the collective cultivation. Accordingly, we conclude the court's instructional errors were prejudicial and require reversal of the judgment.

Given our disposition, we need not address appellant's contentions regarding the trial court's refusal to modify his probation conditions to permit him to use and possess marijuana and the trial court's failure to apply his excess custody credits to his fines and fees.

DISPOSITION

The judgment is reversed and the cause remanded for a new trial.

NOT TO BE PUBLISHED.

FERNS, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

---

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.